S. S. REPORTS.

[ADMIRALTY JURISDICTION]

McELWAINE, C.J.

October 10, 1939.

E. PETERSON v. s.s. "BAN HO LIONG" TAN LARK SYE & ONG WAI SOEY — THIRD PARTIES.

[SINGAPORE ADMIRALTY SUIT No. 1 of 1939]

Action in rem—Evidence Ordinance S. 92—Owner's right to indemnity by charterers for engineer's salary.

A master of a vessel engaged an engineer who signed the ship's articles as chief engineer at a salary of $340 per month less 10%. The engineer claimed pay at this rate and the ship owner contested the claim on the ground that the articles did not contain the real terms of the contract and that there was a parol contract between the parties which was intended to supersede the articles. The owner claimed to be indemnified by the charterers.

Held, that parol evidence could not be given as between the engineer and the owner to contradict or vary the articles and to prove that the wages agreed to by the engineer were not $340 less 10% as mentioned in the agreement with the crew.

Held further, that none of the **provisos** to S. 93 of the Evidence Ordinance applied to this case.

Held also, that the charterers must indemnify the owner.

Cases referred to:—

(1) *Narainan Pillay v. The Netherlandsche Handle Maatschappij* 3 M.L.J. 227.

(2) *Somasundram Chetty v. Lim Ham Kai & Ors.* (1927), S.S.L.R. 64.

HEARING.

P. F. de Souza for plaintiff.

C. H. Smith for owner.

R. L. Eber for charterers.

The facts and arguments sufficiently appear from the judgment.

McElwaine, C.J.—The plaintiff, a certified engineer and member of the "Association of Engineers" Singapore, claims $684 as the balance due to him for wages as chief engineer of the s.s. "Ban Ho Liong" from 2nd July, 1938, to 31st October, 1938, at $340 per month (less 10%), he having been paid at the rate of $180 per month.

The s.s. "Ban Ho Liong" is a steamer of 490 gross and 210 net tonnage owned by a resident of Singapore but registered in Amoy, China, and was at all material times engaged in voyages between Singapore and ports within the Home Trade Limits as defined in the Merchant Shipping Ordinance.

Notice of intention to issue the writ was given to the Chinese Counsul-General under The Admiralty Procedure Rules and on 27th February, 1939, the writ was issued, and on 2nd March 1939, it was posted on the main mast of the steamer, which was arrested on the 6th. On the 7th the owner Tan Sin Tjoe (married woman) entered an appearance. On 13th March she issued a summons in Chambers applying for leave to issue a Third Party notice against Tan Lark Sye and Ong Wai Soey which leave was granted on the 20th, and on the 22nd the third party notice was issued, claiming indemnity from the third parties as charterers of the ship.

I may here note that neither in the writ nor in the statement of claim is the charter party alluded to nor is any reference made to the owner, the action being in rem.

It is only necessary to set out two paragraphs of the statement of claim:—

> "5. By an Agreement in writing dated the 2nd day of July, 1938, and in accordance with the Merchant Shipping Ordinance (Cap. 150) the Plaintiff was engaged by the Master of the said steamship "Ban Ho Liong" as first engineer for a period not exceeding six months subject to 24 hours notice on either side.
>
> 6. Pursuant to the said agreement the plaintiff was entitled to $340 less 10% deduction from his salary a month."

Tan Sin Tjoe, the owner, filed a defence admitting all the paragraphs of the statement of claim except paragraph 6 of which she professed to have no knowledge of the allegations therein contained.

The defence proceeded to state that on 2nd July, 1939, the steamer was in the possession and under the control of the third parties as charterers and that the owner was not a party to the agreement in writing alleged in paragraph 5 of the statement of claim and that it was not entered into by any one on her behalf.

So far as an action in rem can be said to be in any sense an action against the owner this action appears to be against the owner because there is a presumption that the master of a ship is the servant of the owner and the defence so regarded it beacuse in support of the third party summons Thio Soen Tioe, the duly constituted attorney of the owner, swore in an affidavit:—

> "This action is brought against the owner by the abovenamed plaintiff for $684 for balance of wages

alleged to be due by the owner to the plaintiff as chief engineer on board the s.s. "Ban Ho Liong", a paragraph in substance repeated by the attorney in a subsequent affidavit."

The plaintiff's case and the third party proceedings were tried together and the main issues were:—

(a) Was the plaintiff appointed by the owner or by the charterer?

(b) Whoever appointed the plaintiff was it agreed between the plaintiff and the person appointing him that his wages were to be $180 per month or $340 less 10% per month?

The owner chartered the steamer on the 19th June, 1937, to one Ong Wai Chiang for twelve months from 23rd June, 1937, and this charter party was duly assigned in July, 1937, to Ong Wai Soey, the second of the third parties. The plaintiff was first engaged in April, 1938, during the continuance of that charter and he was re-engaged about the 2nd July, 1938, during the currency of the charter to the third parties.

A material clause in each charter party was:—

"That the owner shall appoint the Master, Officers, seamen, engineers and firemen and the Charterers will pay the wages of the said Master, Officers, engineers and firemen."

On the agreement of the crew of the "Ban Ho Liong" dated the 3rd January, 1938, (at which date A.A.E. Lippe was master) the plaintiff signed on on the 19th April, 1938, as chief engineer at $340 per month and he signed off on the 2nd July, 1938, having been paid at the rate of $180 per month. On that day he signed on on a new agreement with the crew (H.M. Letsch master) at $340 less 10% per month.

There was a good deal of controversy as to who appointed Letsch as master, but I am satisfied that it was the owner who appointed him though Letsch may previously have been seen by Tan Eng Kiat, the charterer's representative about the appointment.

Mr. Eber argued that I am entitled to go behind the articles and ascertain what was the true agreement, and much evidence was given without objection on this issue. Indeed, the plaintiff admitted in cross-examination that he never received during 1937 his full $340 a month nor did he receive pay at that rate from the 19th April, 1938, when he first joined the "Ban Ho Liong" until the 31st October, 1938, when he finally left her refusing to sign off because he had not been paid at the rate of $340 less 10% as stated in the articles. The plaintiff also admitted "I find it hard to get jobs. I am in ill health. I was compelled to accept jobs for less than the standard wage."

Now between the owner and the third parties the evidence and cross-examination would be admissible so far as it was necessary to shew what the owner represented to the charterers to be the wages which the charterer by the charter party undertook to pay. But it by no means follows that as between the plaintiff and the owner this evidence is admissible.

Whether an agreement with the crew is legally necessary in the case of a ship on a foreign register is not now material because the articles of the 3rd of January, 1938, purport to represent the terms of a contract reduced to writing.

Section 92 of the Evidence Ordinance enacts that when the terms of a contract have been reduced by or by consent of the parties to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself.

Mr. Eber argues that this section does not apply because the articles do not contain the terms of the contract and I am satisfied from the evidence which I have heard that the articles signed by the plaintiff on the 19th April, 1938, do not represent the contract made that day and were not intended to represent it.

But am I entitled to have regard to that evidence as between plaintiff and owner in view of S. 92 of the Evidence Ordinance?

Only one case on this point was cited to me—*N.S. Narainan Pillay v. The Netherlandsche Handel Maatschappij*[1] a local Court of Appeal decision. That case turned on what is now S. 93, *provisos* 1 and 2 of the Evidence Ordinance. The Court had to consider a memorandum of sale by the defendant bank to one Chellappa of certain property mortgaged to the bank and sold under the mortgagee's power of sale. The Bank sought to prove that Chellappa was its agent or nominee.

That case decided that evidence can be given as to the capacity in which a party to an apparent contract in writing has entered into it. It held, as I understand it that any evidence could be given which would shew the contract to be invalid.

It was not pleaded that the agreement with the crew was fraudulent as between the plaintiff and the owner. Nor was there any question of the capacity in which the parties contracted.

In *S.K.R.S.L. Somasundram Chetty v. Lim Ham Kai & Ors.*[2] it was decided that the English rule of equity upon which apparently Bucknill, C.J. had founded himself, did not apply in the Colony. It does not appear from the report of *Somasundram's* case that *N.S. Narainan Pillay v. Netherlandsche Handel Maatschappij* (*supra*) was cited. Although the latter was

a case of 1915 it was not reported until 1934. I should doubt whether the equitable jurisdiction which the Court has under S. 11 Sub-sec. 1 (a) of the Courts Ordinance necessarily involves a power to apply rules of equity which are at variance with the provisions of the Evidence Ordinance.

I am of opinion that parol evidence cannot be given as between the plaintiff and the owner to prove that the wages agreed to in April, 1938, were not $340 less 10% as mentioned in the agreement with the crew and that none of the *provisos* to S. 93 applies. Should I be wrong in this view and should the evidence which was admissable in the third party proceedings be held by a superior court to have been also admissible as between plaintiff and owner then in that case I would find as a fact that the plaintiff and owner agreed, and the third party through his agent Kiat knew, that the oral agreement of the 19th April, 1938 was that the wages were to be $180 and that the articles were to shew $340 less 10%.

I now come to the engagement signed on the 2nd July which is the basis of this action. The articles of that day were signed by Captain Letsch who regarded himself as having been appointed by the charterers, but I find he was engaged by the owners and that he signed an agreement with the owners which agreement was prepared by Tay Kok Bok, the owner's representative though he may have been introduced to the owner by Kiat. Captain Letsch in his evidence stated that Kiat (the charterer's representative) told him to sign on the crew on the same conditions as before. An important point in Captain Letsch's evidence was that when plaintiff came to sign on on the 2nd July he complained that he had not been paid in full under his employment from April but that he (Letsch) induced him to sign off the old articles and on to the new. Only one payment was made at the hand of Captain Letsch and that was at the end of September when Captain Letsch at Palembang paid plaintiff $180, which plaintiff at first refused to accept, he refused to sign the pay-roll but ultimately took the money and gave receipt "to account." Letsch did not explain why he tendered $180 instead of the amount in the articles.

Some attempt was made to discredit Letsch whose evidence was directed to shewing that the charterers and not the owners had engaged him. Letsch at the time of this trial was chief officer of another steamer the "Ban Ho Guan" alleged to be owned by a Netherland East Indies Company. This ship is referred to in the charter party in the concluding clause as being the property of the owner of s.s. "Ban Ho Liong." The clause is as follows:—

> "It is further agreed that should the owner require the steamer (i.e. "Ban Ho Liong") to replace her vessel known as the "Ban Ho Guan" during the latter's annual survey in or about September 1938 the charterers will release the steamer from this charter during the said survey and the charter hire will cease during such period."

The Singapore agent of the s.s. "Ban Ho Guan" is Chop Ek Liong Hin of which Thio Soen Tioe, the attorney and husband of the owner of s.s. "Ban Ho Liong" is proprietor. I therefore think that Letsch is substantially in the employ of the same persons as he was when engaged in July 1938 and this possibly affected the importance he attached to the interviews he had with the charterer's representatives prior to his being engaged as master of the "Ban Ho Liong", but I am satisfied that he was actually engaged by the owner of that ship.

While I am satisfied that the plaintiff was present at the office of the attorney of the owner on the 19th April (when he was asked not to shame Kok Bok by demanding higher wages) he does not appear to have been there on the 2nd July the date of the re-engagement, but he was signed on by the master Letsch who was the owner's agent. As to this re-engagement there is no direct evidence (admissable or inadmissible) of a new agreement by the Plaintiff to accept $180 per month as his wages. The direct evidence of this engagement is that of the plaintiff who swore that on the 2nd July he was engaged by Letsch the master of the "Ban Ho Liong", and Letsch's evidence that Kiat (the charterer's representative) told him in the presence of Kok Bok (the owner's representative) to sign on the crew on the same conditions as before. There is no evidence that the plaintiff was present at this interview or that when he signed on any mention was made between him and Captain Letsch or any other person representing either owner or charterer that his true salary was to be $180. If therefore I am wrong in holding that parol evidence cannot be given to vary the written contract, there was in fact no evidence to vary the contract of the 2nd July even if such evidence would have been admissible, such evidence as might appear to bear on this matter, being conversations between persons who did not include the plaintiff.

For these reasons I am of opinion that the plaintiff is entitled to recover from the owner of s.s. "Ban Ho Liong" or more correctly to enforce his lien against the ship for the amount claimed, and that the amount paid into Court to release the ship must be paid out to him.

I have found as a fact that the owner's agent represented to the then charterer Ong Wai Soey in

April, 1938 that the plaintiff's wages were $180. Ong Wai Soey is one of the parties to the second charter and against him and his co-charterer the owner claims indemnity.

The business of the ship was conducted on behalf of the charterer under the old charter party and on behalf of the same person and his co-charterer under the charter party which was in force in July 1938 by Tan Eng Kiat and such knowledge as he possessed must be imputed to his principals the third parties.

From Kiat's evidence it appears that he was aware that the plaintiff's predecessor as chief engineer, a man named Boyer was engaged at $180 on the 29th March 1938. Boyer was on the agreement of the crew at $340 per month. On the 19th April he was tendered payment at the rate of $180 but he demanded payment at the rate of $340 and Kiat paid him at that rate "for the sake of peace." Kiat certainly knew of the terms of the agreement of the crew when he paid Boyer, if he did not know at an earlier date. Boyer was given 24 hours notice in accordance with a term in the agreement of the crew.

Kiat was present at the interview on the 19th April 1938, between the plaintiff and Kok Bok. Kok Bok swore that Kiat brought plaintiff to him in order that Kiat should persuade the plaintiff to accept $180 instead of $200 which plaintiff was demanding. The plaintiff was prepared to deny that he made any arrangement about salary at the owner's office on the 19th April, but this evidence was not given by the plaintiff in a convincing manner and I am not prepared to accept it.

I think Kiat's account of what happened at this interview is probably true and I accept it. According to Kiat, Kok Bok told the plaintiff on the 19th April to be careful and not to put Kok Bok to shame and to keep to the agreement. This, Kiat explained, meant that the plaintiff was not to follow in the footsteps of Boyer who demanded more wages than he had agreed to accept. Now, this interview took place a very short time after Boyer had successfully demanded payment according to the agreement of the crew instead of in accordance with his alleged prior agreement. How could the plaintiff demand more than $180 if it was contemplated that the agreement of the crew should contain this sum as his wages? The plaintiff was unquestionably signed on that very day at $340 less 10% and I find as a fact that before the ship's articles were signed it was well known both to Kok Bok and to Kiat that the plaintiff was to be signed on at the union rate of wages. Kiat's evidence as to what happened on the 2nd July, when the plaintiff was not present, cannot affect the Plaintiff's case, but it has an important bearing on the third party issue. According to Kiat, Kok Bok told Captain Letsch in Kiat's presence to take the whole crew to the shipping office and to have them signed on for a new term on the same old wages and arrangements because the agreement of the 3rd January, 1938 had expired.

This means that Captain Letsch was to sign on Peterson at the same rate as before. The rate in the January agreement which the plaintiff had signed on the 19th April was $340 and according to these instructions Captain Letsch signed Peterson on at the same sum of $340 but this was to be subject to a deduction of $10%. Mr. Butcher, the Secretary of the Association of Engineers, said that $340 was the minimum wage the plaintiff could take but that since 1931 this sum was in his case subject to a cut of 10%. Why the 10% was not deducted in the April agreement or in earlier agreements in which Peterson signed on I do not know unless it was that the agreements in writing were regarded as being of no importance.

I find then that Kiat, the charterer's agent, knew that the plaintiff was to be signed on in April at $340, and that he knew he was to be signed on in July at $340.

I find that there was no misrepresentation by the owner as to Peterson's wages made to the third parties. There was in fact a verbal agreement that the plaintiff was to be paid $180 and this the third parties knew through their agent Kiat. There was in fact another understanding between the owner and Peterson that Peterson should be signed on at the Union rates of wages and this understanding was also known to the third parties through their agent Kiat.

When by the charter party the charterers (third parties) undertook to pay the wages of the plaintiff (among others) they undertook to pay the wages to which the plaintiff should be legally entitled. No doubt they hoped he would not ask for more than $180 or they may have thought that the parol agreement would prevail over the written. As I hold that as between the parties to that written agreement there was neither fraud nor mistake which would justify rectification of it, the plaintiff, as I have already decided, is entitled to recover under it and the owners are entitled to be indemnified by the third parties for the $684 which the plaintiff is entitled to recover.

This sum was paid into Court by the third parties to procure the release of the s.s. "Ban Ho Liong" after

the pleadings in the third party proceedings had closed. As the issue in those pleadings was as to who should pay the plaintiff the $684 should he be held to be entitled to that sum it follows that the third party being held liable, they must pay to the owners the costs occasioned by the third party proceedings. These costs will not include such costs as were incurred in the plaintiff's suit.

It has become unnecessary to decide whether the plaintiff a Eurasian British subject, is an Asiatic seaman within the meaning of S. 53 ss. 1 of the Merchant Shipping Ordinance or whether if the section does not apply, the agreement should have been in accordance with S. 43.

The form of agreement was not selected by the plaintiff. In any case the agreement conforms in substance with the agreement required by S. 43. That section does not forbid the insertion of rates and the insertion of the rate (assuming it to be unnecessary) does not render the agreement invalid or any less a written contract.

The plaintiff sues in *forma pauperis* and I make no order as to costs in the proceedings to which he is a party.

Claim allowed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J. (S.S.), POYSER, C.J. (F.M.S.) & GORDON-SMITH, Ag. J.A.

June 27, 1940.

ABDUL WAHAB BIN ABDUL RAUF & ANOR.
v.
HAJI WAHAB BIN HAJI MOHAMED & ANOR.

[MALACCA APPEAL No. 5 of 1940]

Malacca Customary Rights Ordinance (Cap. 125) —S. 111.

Malacca customary land is not capable of devise by will and the land descends on the death of the holder to the holder's heirs according to Mohamedan law. Any attempt to devise such land by will is nugatory.

APPEAL.

J. C. Cobbett and H. A. R. Paulusz for appellants (defendants).

Roland Braddell and S. C. Goho for respondents (plaintiffs).

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—One Haji Maimunah binte Haji Abdul Wahab died on the 19th day of February, 1921, leaving a will dated the 21st January, 1921. She appointed Inche Mohamed to be her executor, and he proved the will on the 27th October, 1921. Inche Mohamed died on the 24th March, 1938, and the first defendant is executor of his will. The first defendant is accordingly derivative executor of Haji Maimunah's will. As executor of Inche Mohamed's will he would be responsible for breaches of trusts and devastavits committed by Inche Mohamed as executor of Haji Maimuah's will, but only in so far as he had in his hands assets of Inche Mohamed's estate. The formal order does not make this clear, and the first defendant is ordered to account on the footing of wilful default as if he were the defaulting executor. The costs, however, were ordered to be paid out of the estate of Inche Mohamed and not by the first defendant personally.

Under the will of Haji Maimunah a certain house at Klebang Ketchil, Malacca, and the land on which it was built, were specifically devised to the plaintiffs who were her grandsons, being the sons of Maimunah's son Raof. The residuary legatees were the sons of the testatrix, Raof and Haji Ahmad. Raof held the testatrix's power of attorney prior to her death, and the land at Klebang was registered in his name. It was customary land within the meaning of the Malacca Customary Rights Ordinance (Cap. 125). It appears that Raof taking advantage of the situation fraudulently borrowed $10,000 on the security of the land from K.V.A.L. Valliappa Chetty prior to Maimunah's death.

On April 22nd, 1921, before Inche Mohamed had obtained probate, Raof wrote to him acknowledging that the land, though in his name, was the property of Maimunah, and that he had charged the land with $10,000—which he had borrowed from K.V.A.L. Valliappa Chetty. He authorised Inche Mohamed to pay the charge on the Klebang property and debit his share in the estate. Unfortunately the executor never had enough money attributable to Raof's share to repay the $10,000, and on the 29th December, 1922 Raof by arrangement with his equitable mortgagee, transferred the land to one Somasundaram Chetty for $10,700. This was apparently sufficient to satisfy K.V.A.L. Valliappa Chetty's debt, but the specific devise in favour of the plaintiffs became of no effect.

The plaintiffs alleged that Inche Mohamed paid other moneys to Raof although his debt of $10,000 had not been repaid, and also that he sold certain land to himself and the second defendant as trustees at an